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In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND
ITS INDIVIDUAL MEMBERS,
Petitioners,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT, STATE OF SOUTH DAKOTA

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INTEREST OF *AMICUS CURIAE*

> RESERVATION IS NO MORE...At twelve o'clock Monday the Nez Perce reservation passed into history . . heads began bobbing up all over the former reservation....
>
> *Lewiston Tribune* (Idaho), November 20, 1895, at 1.

> CANNON BOOMED AT NOON...The cannon was fired in front of the land office, at twelve o'clock, Monday. This was the death knell of the great Nez Perce reservation, and the introduction of new conditions to follow these important changes.
>
> *Lewiston Teller* (Idaho), November 21, 1895, at 1.

The interest that prompts the filing of this Brief of Lewis County, Idaho, *Amicus Curiae,* in Support of Respondent, State of South Dakota, can be simply stated. Ninety percent (90%) of Lewis County is within the former 1863 Nez Perce reservation.

Lewis County, Idaho, has the support of an association of local governmental units, the North Central Idaho Jurisdictional Alliance, in filing this brief *amicus curiae*. The Alliance consists of three counties, eight cities, three school districts and seven highway districts in North Central Idaho, whose geographic boundaries include land which was within the Nez Perce reservation as it existed prior to 1894. In this instance, the Nez Perce cession agreement, like the Yankton agreement construed in *South Dakota v.*

Yankton Sioux Tribe, 522 U.S. 329 (1998), encompassed *all* of the unallotted lands of the 1863 Nez Perce reservation (except for a small timber reserve). *See also DeCoteau v. District County Court*, 420 U.S. 425, 438, 446-47 (1975). And as we will show, other pertinent factors are also remarkably similar to those found in the Yankton case. Today, the 1863 Nez Perce reservation is a rural area primarily owned and populated by non-Indians. Approximately ninety percent (90%) of the land is owned by non-Indians and approximately (90%) of the population is also non-Indian. In this rural area of central Idaho, for nearly three-quarters of a century, the jurisdictional history has also been equally clear. Early on, state and federal cases, including the pathmarking decision of this Court in *Dick v. United States*, 208 U.S. 340 (1908), were premised upon Nez Perce reservation disestablishment. However, assertions of tribal jurisdiction over nonmembers and/or claims regarding the lack of state jurisdiction over tribal members have caused the issue to resurface in the State of Idaho.

Significantly, the 1894 Indian appropriation act that ratified the Yankton cession agreement also ratified the similar Nez Perce cession agreement. Act of August 15, 1894, ch. 290, 28 Stat. 286, 326. It was not unusual for Congress to adopt this format for the ratification of more than one cession agreement, as *DeCoteau* attests. *DeCoteau*, 420 U.S. at 439-441 & nn. 21, 22 (seven agreements). As a result, although the Nez Perce agreement started out as a separate measure with independent cession instructions, agency correspondence, and tribal negotiations, and although it was reported separately as S. Exec. Doc. No. 31, 53d Cong., 2d Sess. (1894), the subsequent congressional debate addressed, among other subjects, all aspects of

both the Yankton agreement and the Nez Perce agreement—sometimes separately, but more often together.

In *Yankton Sioux Tribe* this Court recognized this important nexus and expressly noted that the agreements were "similar", with common references in the floor debates to "support a finding of diminishment". *Yankton Sioux Tribe*, 522 U.S. at 339, 353. The ninth circuit court of appeals mistakenly ignored all of this. *United States v. Webb*, 219 F 3d 1127 (9th Cir. 2000) (Fletcher, Betty, J), *cert denied*, 531 U.S. 1200 (2001). In the process, the court of appeals decided this issue, involving an important question of federal law, in express conflict and in conflict in principle with the relevant decisions of this Court, in conflict in principle with the decisions of all other courts of appeals, and in express conflict and in conflict in principle with the decisions of the Supreme Court of the State of Idaho.

The argument the United States unsuccessfully advanced against Nez Perce reservation disestablishment in a state case is set forth in detail in Lewis Co. App. 1a-62a. *In Re Snake River Basin Adjudication*, No. 39576 (5th Jud. Dist., Id. County of Twin Falls) (2000). Consideration of the issue in the Idaho Supreme Court, which has repeatedly confirmed Nez Perce reservation disestablishment for nearly a century, was stayed and eventually resolved by settlement.

At the time, Webb filed a petition for certiorari in this Court that addressed these conflicts. The State of Idaho, Lewis County, Clearwater County and other counties, filed briefs in support of that petition. Brief

of Lewis County, Idaho *Amicus Curiae*, in Support of Petitioner, *Webb v. United States*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (No. 00-8166), and Brief of Clearwater County, Idaho *Amicus Curiae*, in Support of Petitioner, *Webb v. United States*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (No. 00-8166). Ultimately, this Court denied certiorari. *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001)

Lewis County had previously participated as *amicus curiae* in *Yankton Sioux Tribe*. Brief of Lewis County, Idaho, *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581). The ultimate decision in Yankton Sioux Tribe is important to Lewis County and the other members of the North Central Idaho Jurisdictional Alliance.

In the past, attempts to resurrect the 1863 Nez Perce reservation boundaries have been most noticeable in conjunction with assertions of tribal jurisdiction over nonmembers and fee lands. For two decades, in a number of instances non-Indian entities have been instructed to fully comply with a Tribal Employment Rights Ordinance (including the payment of substantial tribal TERO taxes and total compliance with tribally dictated hiring practices) or face tens of thousands of dollars of tribal fines or other tribal enforcement actions in tribal court. For some projects, it has been estimated that the TERO requirements would increase existing costs by hundreds of thousands of dollars. Entities that were initially said to be subject to TERO include local governmental subdivisions and school districts, as well as private

contractors. Most recently, in January, 2011, all contractors doing business on the "Nez Perce Reservation" were told to comply with the tribal TERO ordinance in no uncertain terms. *Clearwater Progress* (Idaho), January 20, 2011. Since that time, the Nez Perce Tribe has withdrawn that demand.

In addition, the Nez Perce tribe assessed an ad valorem tax against certain non-Indian businesses that conduct business on non-Indian lands within the 1863 reservation boundaries Although the exact status of this ad valorem tax is unclear, the amount at risk is substantial—potentially involving hundreds of thousands, if not millions of dollars (2.7 percent tax on assessed value). The arrest of two nonmembers by the "newly created" Nez Perce tribal police for minor traffic offenses, and their citations to appear in tribal court, added to an atmosphere already charged with uncertainty and distrust At the time, challenges to the tribal arrests were widely publicized. After a motion to dismiss by special appearance was formally filed in tribal court, the Nez Perce tribe reportedly decided, at least for the time being, to skip that jurisdictional controversy. The Nez Perce tribal prosecutor voided the citations.

The Superintendent of the Northern Idaho Agency continues to notify Lewis County of the Nez Perce tribe's approved application to remove acres of land from the tax rolls. This action was justified by the Superintendent on the basis of the existence of the 1863 reservation boundaries.

The options of Lewis County with respect to a decreasing tax base are strictly limited by Idaho statute. At some point in the future, this process, if

allowed to continue on the basis of the existence of 1863 reservation boundaries, will severely limit the services Lewis County can provide to county residents.

In light of all of the above, the status of the 1863 Nez Perce reservation is still of substantial concern to resident nonmembers and local governmental entities, more than three decades after the decision of this Court in *DeCoteau*.

In the end, local jurisdictions have been told to expect litigation on this issue at a probable cost of millions of dollars. The 1894 Act of Congress in this case is clear. The court of appeals in *Webb* was mistaken. *DeCoteau* resolved this issue. *Yankton Sioux Tribe* rejected the savings clause argument and confirmed the principles set forth in *DeCoteau*. The ninth circuit court of appeals should not have glossed over the "'nearly conclusive' or 'almost insurmountable'" presumption of disestablishment, that should have been the focal point in the *Webb* case. This Court reaffirmed that presumption in *Yankton Sioux Tribe*, 522 U.S. at 344.

This Court should reaffirm that presumption in a manner that demonstrates that the chances of success in seeking a reestablishment of original reservation boundaries in Idaho or elsewhere are slim. At the same time, such a conclusion will put this divisive issue to rest.

ARGUMENT

1. Lewis County further submits that the scope of the holding in *Webb* is less than clear from the opinion of Judge Fletcher ("the court intimated that it need not decide the status of the lands ceded in the 1894 Act. *Id.* at 1133 "). Brief of State of Idaho as *Amicus Curiae*, *Webb v. United States*, No. 00-8166 at 4. In either case, however, substantial conflicts exist. Even if *Webb* could be construed to hold only that the status of the former allotted fee lands are Nez Perce reservation, that holding would conflict in principle with the remand in *Yankton Sioux Tribe* that succinctly rejected the same claim. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, *South Dakota v. Yankton Sioux Tribe*, 120 S. Ct. 2717 (2000). It would also conflict in principle with the holding in *DeCoteau* and *United States v. Pelican*, *232* U.S. 442 (1914). In fact, it would be completely unprecedented.

2. Lewis County has set forth a table that makes clear that the Nez Perce act is the functional twin of the acts construed in *DeCoteau* and *Yankton Sioux Tribe*.

> Salmon River Billy: ...[T]he country had been inclosed according to the treaty and prevented the entrance on the reservation of any white man and any who should try to set aside or *break down the boundaries* of that reservation .... Perhaps it may be on account of having another President, who is a Democrat; perhaps it is he who has made the *edict for breaking down the lines of the reservation.*

S Exec. Doc. No. 31 at 56 (1894) (emphasis added).

Even before *Yankton Sioux Tribe*, it should be noted that the decision of this Court in 1975 in *DeCoteau v. District County Court*, 420 U.S 425 (1975) certainly appeared to be controlling in this situation. In *DeCoteau*, the State of Idaho joined the State of North Dakota and others as *Amici Curiae*. Brief for the State of North Dakota, et al. as *Amici Curiae* at 1, *DeCoteau v. District County Court*, 420 U.S 425 (1975) (No 73-1148). The scope of that brief, like the scope of the *DeCoteau* Opinion, was not limited to the specifics of the Sisseton-Wahpeton agreement. It submitted, in general terms, the strong, definite, acquired and clear meanings of the terms "cede," "sell," "relinquish" and "convey." *Id.* at 1. That submission was intended to resolve cessions in the context of both the Yankton agreement and the Nez Perce agreement. *DeCoteau* was crafted in the same manner.

In this cession situation, *DeCoteau* makes clear that the jurisdiction tribes should be limited to tribal trust lands. *DeCoteau*, 420 U.S. at 427 n.2, 446-447. *Webb* erred when it missed this key aspect of the *DeCoteau* decision. Federal jurisdiction simply would not extend to the former allotted fee land

Yankton Sioux Tribe generally confirmed *DeCoteau*. *Id.* at 798. Moreover, *Yankton Sioux Tribe* did not question this aspect of the *DeCoteau* opinion.

In further support of the position that *DeCoteau* is especially important here, the following table sets forth corresponding provisions of the respective acts.

SISSETON DISESTAB-LISHMENT	YANKTON DISESTAB-LISHMENT	NEZ PERCE DISESTAB-LISHMENT
Time period equivalent	*Time period equivalent*	*Time period equivalent*
Agreement approved 1891.	*Agreement approved 1894.*	*Agreement approved 1894.*
26 Stat. 1035 (1891). *See also DeCoteau*, 420 U.S. at427	28 Stat. 286 (1894). *See also Yankton Sioux Tribe*, 522 U S at 336-339.	28 Stat. 286 (1894).
Allotment of substantial territory under General Allotment Act.	*Allotment of substantial territory under General Allotment Act.*	*Allotment of substantial territory under General Allotment Act.*
DeCoteau, 420 U.S. at 455.	28 Stat. 286, 314; *See also Yankton Sioux Tribe*, 522 U.S. at 335-336.	28 Stat. 286, 326.
Interior Instructions to Commissioners	*Interior Instructions to Commissioners*	*Interior Instructions to Commissioners*
"The treaty makes no provision regarding the cession or	"The treaty makes no provision regarding the cession or	[Not Available]

relinquishment of the reservation or any portion thereof" "The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement, which should be signed by at least a majority of the male adults of the bands." Letter from Commissioner of Indian Affairs to the Sisseton Commission of August 13, 1889.	relinquishment of the reservation or any portion thereof." "The terms and conditions agreed upon in council, should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a majority of the male adults of the members of the tribe" Letter from Commissioner, J. F. Morgan, Dept of Interior to Commissioners of July 27, 1892.	
Preambles equivalent.	*Preambles equivalent.*	*Preambles equivalent.*
The Sisseton	"The Yankton	"[T]he said Nez

Indians "are desirous of disposing of a portion of the land set aside and reserved to them...." 26 Stat. 1035, 1036, See also, *DeCoteau*, 420 U.S. at 455.	Tribe...is willing to dispose of a portion of land set aside and reserved to said Tribe...." 28 Stat. 286, 314.	Perce Indians are willing to dispose of a portion of the tract of land ..reserved.. " 28 Stat. 286, 327.
Cession language used.	*Cession language used.*	*Cession language used.*
"The Sisseton and Wahpeton Bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest...." Art. I, 26 Stat. 1035, 1036, See also *DeCoteau*, 420 U.S. at 456.	"The Yankton Tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Art. I, 28 Stat. 286, 314, *See also Yankton Sioux Tribe*, 522 U.S. at 337-338.	"The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Art I, 28 Stat. 286, 327.

All unallotted lands ceded.	*All unallotted lands ceded.*	*All unallotted lands ceded.*
Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement...." Art. I, 26 Stat. 1035, 1036, See also *DeCoteau*, 420 U.S. at 456.	Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid " Art. I, 28 Stat. 286, 314; *See also Yankton Sioux Tribe*, 522 U.S. at 337-338.	Cession pertains to "all the unallotted lands within the limits of said reservation.. ." Art. I, 28 Stat. 286, 327.
Sum Certain Language Used.	*Sum Certain Language Used.*	*Sum Certain Language Used.*
Sisseton Agreement provides "[i]n consideration for the lands ceded, sold, relinquished and conveyed...the	Yankton agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the	Nez Perce agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed...the

United States stipulates and agrees to pay...the sum of two dollars and fifty cents per acre for each and every acre thereof...."Art. 2, 26 Stat. 1035, 1036, See also *DeCoteau*, 420 U.S. at 456	United States...the United States stipulates and agrees to pay.. the sum of six hundred thousand dollars...." Art. II, 28 Stat. 286, 315; *See also Yankton Sioux Tribe*, 522 U.S. at 337-338.	United States stipulates and agrees to pay...the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars...." Art III, 28 Stat. 286, 329.
Entry subject to homestead and townsite laws.	*Entry subject to homestead and townsite laws.*	*Entry subject to homestead and townsite laws.*
"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall...be subject only to entry and settlement under the homestead and townsite laws of the United States..." 26 Stat 1035,	"That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States..."	"That ..the lands so ceded, sold, relinquished, and conveyed to the United States shall be opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town site, stone and timber, and

1036	28 Stat. 286, 319, *See also Yankton Sioux Tribe*, 522 U S. at 337 n.1	mining laws of the United States...." 28 Stat 286, 332.
Missionaries allowed to purchase lands.	*Missionaries allowed to purchase lands.*	*Missionaries allowed to purchase lands.*
Art II, 26 Stat. 1035, 1037, See also *DeCoteau*, 420 U.S. at 457.	Art. X, 28 Stat. 286, 316; *See also Yankton Sioux Tribe*, 522 U.S. at 336-337.	Art. VI, 28 Stat. 286, 330.
School lands granted to State with public domain / reservation extinguishment premise.	*School lands grant with public - domain / reservation extinguishment premise.*	*School lands granted to State with public domain / reservation extinguishment premise.*
("excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the	("excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be common-school purposes and be subject to the laws of the	("excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the

State"). 26 Stat. 1035, 1039, See also *DeCoteau*, 420 U.S. at 442. For public domain premise, see H.R. Rep. No. 7613, 59th Cong , 2d Sess. (1907).	State of South Dakota"). 28 Stat. 286, 319. For public domain premise, see H.R. Rep. No. 7613, 59th Cong , 2d Sess. (1907), *See also Yankton Sioux Tribe*, 522 U S at 339, 349-350.	laws of Idaho"). 28 Stat. 286, 332. For public domain premise, see H.R. Rep. No. 7613, 59th Cong., 2d Sess. (1907).
United States retained an agency and schools.	*United States retained an agency and schools.*	*United States retained an agency and schools.*
DeCoteau, 420 U.S at 435 n.16; *id.* At 438 n.19.	28 Stat. 286, 316; *See also Yankton Sioux Tribe*, 522 U.S. at 336, 337 n.1.	28 Stat. 286.
Allotments were throughout the former reservation. 26 Stat. 1035, 1036; *DeCoteau*, 420 U.S. at 428.	*Allotments were throughout the former reservation.* 28 Stat. 286, 314; *Yankton Sioux Tribe*, 522 U.S. at 336.	*Allotments were throughout the former reservation.* 28 Stat. 286, 314.
The proclamation opening the	*The proclamation opening the*	*The proclamation opening the*

reservation referred to a conveyance of "all their title and interest" and quoted the cession language of the Act.	*reservation referred to a conveyance of "all their claim, title and interest" and repeated the cession language of the Act.* *Yankton Sioux Tribe*, 522 U.S. at 339, 354.	*reservation referred to a conveyance of "all their claim, right, title and interest" and repeated the cession language of the Act.*
27 Stat. 1017, 1018 (April 11, 1892).	29 Stat. 865, 866 (May 16, 1895).	29 Stat. 873, 876, November 8, 1895)
Congress clearly intended to return the land to the public domain *DeCoteau*, 420 U.S. at 440-441.	*Congress clearly intended to return the land to the public domain.* 26 Cong Rec. 6425 (1894); *id.* at 6426. *Yankton Sioux Tribe*, 522 U.S. at 353-354.	*Congress clearly intended to return the land to the public domain.* 26 Cong. Rec 6425 (1894); *id.* at 6426. *See also* references to Nez Perce in *Yankton Sioux Tribe* at 353-354.
State assumed virtually unquestioned jurisdiction. *DeCoteau*, 420	*State assumed virtually unquestioned jurisdiction* *Yankton Sioux*	*State assumed virtually unquestioned jurisdiction.* *Dick v. United*

U.S at 442.	*Tribe*, 522 U.S. at 357.	*States*, 208 U.S. 340, 352 (1908)
Sisseton, Yankton, and Nez Perce generally treated in parallel fashion on maps of the United States and in the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior.	*Sisseton, Yankton, and Nez Perce generally treated in parallel fashion on maps of the United States and in the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior. See also Yankton Sioux Tribe* at 354	*Sisseton, Yankton, and Nez Perce generally treated in parallel fashion on maps of the United States and in the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior. See also Yankton Sioux Tribe* at 354.

Even a cursory comparison of the provisions of the Sisseton-Wahpeton act, the Yankton act and the Nez Perce act unequivocally substantiates the argument that the 1894 Nez Perce statute is a functional twin of both. For example, the "operative language" of each statute provides: "[C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Act of March 3, 1891, 26 Stat. 1036 (Sisseton-Wahpeton act-appended in *DeCoteau*, 420 U.S. at 449); "[C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Act of August 15, 1894, 28 Stat. 286, 314-318 (Yankton act); "[C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest... " Act of August 15, 1894, 28 Stat. 286, 326

(Nez Perce act). Additional examples with the same or similar dispositive cession terminology are set forth in *DeCoteau*, 420 U.S. at 439-440 n. 21.

Beyond the "operative language" on the face of the statutes, which this Court has found to be most significant in resolving questions of this nature, the other Nez Perce documentation confirms the significance and strength of the comparison. In fact, in the congressional debates, key congressional speakers specifically reference agreements from the past as precedent for the 1894 legislation. 26 Cong. Rec 8258, 8265-69 53d Cong., 2d Sess. (1894). Mr Pickler: ". .The same kind of treaty we have always made." *Id.* at 8265. Mr. Pickler. ". . . These are treaties, just as all other cessions of land have been." *Id.* at 8268. *Webb* failed to address this fundamental premise found throughout the congressional debate.

In every other respect, the remainder of the Nez Perce documentation confirms this same understanding. For the most part, this documentation is set forth in S Exec. Doc No. 31, 53rd Cong., 2d Session (1894), which contains the official Nez Perce correspondence, reports, transcripts and cession agreement, and also in the congressional debates and reports on the 1894 Act. *See* H.R. Rep No. 6913, 53d Cong , 2d Sess. (1894); Act of August 15, 1894, 28 Stat 286.[1]

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[1] Although three short years and one session of Congress separates the passage of the Sisseton-Wahpeton and the Yankton and Nez Perce Acts, parts of the process were actually under consideration in both sessions. Many of the key congressional participants in the process continued to hold office through the passage of the 1894 Act And the fact that approximately *one third*

CONCLUSION

Amicus Curiae Lewis County, Idaho, while not agreeing this case cannot separately be resolved and affirmed, supports the conclusion of the State of South Dakota to not oppose holding this Petition until disposition of the lead disestablishment petitions to allow a full and fair presentation of the matter.

Respectfully submitted,

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of the members in the House of Representatives and *two-thirds* of the members in the entire Senate for the 51st Congress (Sisseton-Wahpeton) were still there in the 53rd Congress when the Yankton and the Nez Perce Acts were finally considered, debated and passed is significant